

TEN YEARS OF THE JENSEN CASE

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If one were to use a figure of speech, one might liken the *Jensen* case,¹ to an *ignis fatuus* wavering along the undefined and irregular boundary between the law of the land and that of the sea, and beckoning the unwary lawyer-pilot, whether he be of the land or of the water, and leading him unwittingly from the land into the sea, or from the sea upon the land, to confusion, if not destruction, either in the sea itself or upon the dangerous shoals that jut into the sea, and fringe the *corpus comitatus*.²

As a survey of the cases will indicate, confusion has resulted from this will-o'-the-wisp, and not only have the lawyer-pilots been brought to confusion in following it, but the state courts and certain of the lower federal courts have come to grief in their attempt to follow it.

The true significance of the *Jensen* case and its proper relation to the subject-matter, can best be appreciated by a résumé of the development of the jurisdiction of admiralty.

The admiral was an official appointed by the king, who exercised "the jurisdiction of the crown in respect of the command and charge of the sea, either during a particular expedition or over a particular district".³ His jurisdiction was originally of a disciplinary and administrative character over the crews of the vessels committed to his orders.⁴

In time a court was established to take over the functions of the admiral. This court gave recognition to new rights and

¹ *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917). In this case a stevedore in the employ of the defendant was killed while engaged in unloading a vessel owned and operated by the defendant and lying in navigable waters. A judgment affirming an award under the compulsory *New York Workman's Compensation Act* made to his representatives by the Industrial Commission of New York was reversed by the Supreme Court of the United States on the ground that the application of the *State Compensation Act* would violate the provisions of Article 3, Section 2, of the Constitution.

² For an able article dealing with admiralty jurisdiction in the United States prior to the *Jensen* case, see Wright, *Uniformity of Maritime Law in the United States* (1925) 73 U. OF PA. L. REV. 123, 223.

³ 2 MEARS, SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 312.

⁴ MEARS, *op. cit.*, *supra* note 3 at 316.

remedies. A controversy between the common law courts and this new admiralty court, as to the extent of the jurisdiction of the latter, has been in progress for seven hundred years.

In the thirteenth century, the jurors "of the vicinage" in a common law court based their verdict, not only upon the evidence offered but partly upon their own knowledge of the facts; therefore, the necessity that the jurors come from the immediate vicinity where the facts in controversy arose. The venue was laid at the place where the facts at issue were asserted to have occurred.⁵ Hence it was that no action lay in an English common law court, when the facts sought to be litigated arose on the high seas.

In the thirteenth and fourteenth centuries new wrongs were being given legal recognition. The action on the case was instituted. Equity was beginning to flourish. New causes were being brought to the admiralty for adjudication and a new jurisdiction became recognized, that of the admiralty on its instance side. This admiralty court took cognizance of wrongs for which the common law gave no redress.⁶

The jurisdiction of the admiralty court on its instance side grew up because there were certain injuries occurring upon the waters for which it was felt there should be a remedy, but for which the common law courts supplied none.

The law as administered in the English court of admiralty was not the common law, but a law based on the civil law, much influenced by the laws of Oleron.

By 2 Stat. Rich. II, st. 2, c. 3 (1379-80), an attempt was made to limit the jurisdiction of admiralty to things done upon the sea. Thus arose the effort in future years to prevent the admiralty court taking cognizance of contracts made in England to be performed upon the high seas.^{6a}

Coke's memorable struggle with Sir Francis Bacon as to the limits of equity jurisdiction had a parallel in his contest with the admiralty judges. Public sentiment in England favored trial

⁵ SCOTT, FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW (1922) 18.

⁶ 3 BLACKSTONE, COMMENTARIES (Sharswood ed. 1872) 106.

^{6a} MEARS, *op. cit. supra* note 3 at 335.

by jury. Admiralty having its roots in the civil law and being largely concerned with the administrative functions of the admiral, had no jury. Thus it came about (by the time of Charles II [1660-85]) that the jurisdiction of admiralty became narrowed, in the words of Sir Mathew Hale,⁷ to

“things done upon the sea only; as depredations and piracies upon the high seas; offences of masters and mariners upon the high seas; maritime contracts made and to be executed upon the high seas; matters of prize and reprisal upon the high seas.”

The common law courts, ever ready to extend their jurisdiction, also came to take cognizance of occurrences on the high seas. The plaintiff desiring to enter the common law courts on a matter where jurisdiction in admiralty might obtain, laid the venue, in his pleading, in England, and this allegation, not being material, was not traversable.⁸

The law applied by the common law courts was not the admiralty law, but the common law.⁹

In the American Colonies, vice-admiralty courts were created. King's commissions were issued from the High Court of Admiralty, empowering the institution of these courts and defining their jurisdiction.¹⁰ The jurisdiction granted these courts was *most extensive*. The commissions

“declare that jurisdiction [admiralty] to extend to all causes, civil and maritime, embracing charter parties, bills of lading, policies of assurance, accounts, debts, exchanges, agreements, complaints, offences, and all matters which in any manner whatsoever relate to freight, transport money, maritime loans, bottomry, trespasses, injuries, extortions, demands and affairs whatsoever, civil and maritime.

“When we look, also, to the extent of this jurisdiction, so far as place is concerned, we find it equally extensive,

⁷ HISTORY OF THE COMMON LAW (6th ed.) c. 2, p. 39, quoted in MEARS, *op. cit. supra* note 3 at 359.

⁸ SCOTT, *op. cit. supra* note 5 at 20, 21.

⁹ See Cunningham, *Admiralty and Maritime Law* (1921) 55 AM. L. REV. 685. For the further development and present jurisdiction of the English admiralty court, see ROSCOE, ADMIRALTY JURISDICTION AND PRACTISE (1920) 19-29.

¹⁰ 1 BENEDICT, ADMIRALTY (5th ed. 1926) 787 *et seq.*

comprehending everything done in, upon, or by the sea, or public streams, or fresh waters, ports, rivers, creeks and places overflowed whatsoever, within the ebbing and flowing of the sea, or high water mark, from all first bridges toward the sea.

"So far as persons are concerned, it is also equally extensive and embraces all demands and affairs between merchants, or merchants and owners of ships or other vessels, and other persons whomsoever, for any matters, cause or thing, business, or injury whatsoever, done as well in, upon, or by the sea, or public streams, or fresh water, ports, rivers, creeks and places overflowed whatsoever, within the ebbing and flowing of the sea, or high water-mark, as upon any of the shores or banks adjoining them."¹¹

It is significant that maritime law was the first subject with which a court under the Articles of Confederation was constituted to deal, viz.—a court to hear appeals from all the states.¹² The first court for determining disputes between states, the only other appellate court constituted by the Federation of States, was created in 1781.¹³

The need of a uniform system of maritime law was a great factor in bringing about the Constitutional Convention in 1787 and in influencing the various states to ratify the Constitution.¹⁴

The only reference to admiralty jurisdiction in the Constitution is contained in Article III, Section 2, which reads as follows:

"The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."¹⁵

¹¹ I BENEDICT, *op. cit. supra* note 10 at 817, 818.

¹² Resolution of January 15, 1780; quoted in Appendix, 131 U. S. xxv (1888).

¹³ See Appendix, 131 U. S. liv (1888).

¹⁴ See article by Davis, Appendix, 131 U. S. xix (1888); FISKE, *CRITICAL PERIOD OF AMERICAN HISTORY* (1888) 171, 175.

¹⁵ The only other mention of admiralty in the Constitution is contained in Article I, § 8, which, *inter alia*, contains the following:

"The Congress shall have power . . .

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

By this clause Congress is empowered to create courts of admiralty. The first Judicial Code contained provisions whereby such courts were to be constituted and provided that the federal district courts shall have jurisdiction of

"all civil causes of admiralty and maritime jurisdiction, . . . saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it."¹⁶

This clause is construed to give Congress the power to legislate as to the substantive law to be applied in an admiralty matter.¹⁷

It will be seen from this résumé that at the time the *Jensen* case came up for decision there was a clear recognition of a definite system of maritime law prevailing in the United States whose substantive and procedural features were under national control, and this because of the intimate relation the subject bore to navigation and to interstate and foreign commerce.

¹⁶ 1 STAT. 77 (1789), U. S. COMP. STAT. (1902) § 711. The admiralty jurisdiction as comprehended by the Constitution is much broader than that as understood in England at the time of the Revolution. *Waring v. Clark*, 5 How. 441 (U. S. 1847) contains a very interesting discussion on this point.

¹⁷ Mr. Justice Van Devanter, in *Panama R. R. v. Johnson*, 264 U. S. 375, 385, 386 (1924) says, "As there could be no cases of 'admiralty and maritime jurisdiction' in the absence of some maritime law under which they could arise, the provision presupposes the existence in the United States of a law of that character. Such a law or system of law existed in Colonial times and during the Confederation and commonly was applied in the adjudication of admiralty and maritime cases. It embodied the principles of the general maritime law, sometimes called the law of the sea, with modifications and supplements adjusting it to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject—its substantive as well as its procedural features—under national control because of its intimate relation to navigation and to interstate and foreign commerce. In pursuance of that purpose the constitutional provision was framed and adopted. Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such power in the United States. Commentators took that view; Congress acted on it, and the courts, including this Court, gave effect to it. Practically therefore the situation is as if that view were written into the provision. After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded or as being only the law of the several States, but as having become the law of the United States,—subject to power in Congress to alter, qualify, or supplement it as experience or changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion."

There was also, however, at the time the *Jensen* case arose an equally clear recognition of a power in the states to legislate as to matters of local necessity where a diversity rather than a uniformity of rule was desirable and there existed under the system of jurisprudence founded by our first Judicial Code a certain jurisdiction (not then delimited by the Supreme Court) in the state courts by virtue of the so-called "saving clause".

A long line of cases recognize the necessity and convenience of permitting a state statute to apply to many matters of a maritime nature. The leading early case is *Cooley v. The Board of Wardens*¹⁸ in which it was held that a vessel may be subjected to local pilotage laws. After pointing out that the power to regulate commerce embraced a vast field and various subjects, the Court in that case said:

"Some [subjects were] imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessity of navigation."

And further on the Court said:

"The nature of the subject is not such as to require its exclusive legislation . . . [but] is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, *drawn from local knowledge and experience** and conformed to local wants."

And later on the Court refers to the subject as one which:

"may be best provided for by many different systems enacted by the States *in conformity with the circumstances* of the ports within their limits".¹⁹

It has been held by the Supreme Court that:

¹⁸ 53 U. S. 299 (1851).

*All italics in this article are the writer's.

¹⁹ 53 U. S. at 319, 320. *Accord*: *Anderson v. The Pacific Coast Steamship Co.*, 225 U. S. 187 (1912).

(1) A vessel is subject to local inspection and quarantine laws.²⁰

(2) That a state law giving a right of action for wrongful death is enforceable when the death is occasioned by an injury sustained on navigable waters (a) if the suit is brought in a state court,²¹ (b) if the suit is brought in a federal court.²²

(3) That a state may prevent or permit the erection of a structure in a navigable stream in the absence of Congressional regulations.²³

(4) That a state may regulate the rates charged for carriage on a navigable stream.²⁴

It has been held that a municipality empowered by a state, may prohibit vessels from berthing at pier ends,²⁵ and a local law requiring vessels to navigate in mid-stream has been upheld.²⁶

It was in such a state of the law that various states passed acts providing for compensation to workmen injured in the course of their employment. These acts differed in form and extent in the various states, but all were founded on a public recognition of a social need; some were elective, some compulsory; but all attempted to provide a uniform and definite rule as to injured workmen similarly placed.

New York passed an act of the compulsory type²⁷ and under it an Industrial Commission, created by the act, awarded compensation to the representatives of one Jensen, a stevedore killed while unloading a vessel of the Southern Pacific Company, at

²⁰ *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455 (1886); *Compagnie Française v. State Board of Health*, 186 U. S. 380 (1902).

²¹ *Steamboat Co. v. Chase*, 16 Wall. 522 (U. S. 1872); *Sherlock v. Alling*, 93 U. S. 99 (1876).

²² *Western Fuel Co. v. Garcia*, 257 U. S. 233 (1921).

²³ *Cummings v. Chicago*, 188 U. S. 410 (1903); *St. Anthony Co. v. Commissioners*, 168 U. S. 349 (1897).

²⁴ *Huse v. Glover*, 119 U. S. 543 (1886); *Sands v. Manistee River Improvement Co.*, 123 U. S. 288 (1887); *Wilmington Transportation Co. v. The Railroad Commission*, 236 U. S. 151 (1914); *Port Richmond Ferry Co. v. The Board of Chosen Freeholders*, 234 U. S. 317 (1914).

²⁵ *The Daniel B. Flannery*, 282 Fed. 545 (C. C. A. 2d, 1922); *The Baker Bros.*, 260 Fed. 650 (C. C. A. 2d, 1919).

²⁶ *The Black Diamond*, 273 Fed. 811 (C. C. A. 2d, 1921).

²⁷ 8 N. Y. ANN. CONS. LAW (2d ed. 1917) 9254, §§ 2, 3, 10, 11.

the time in New York Harbor, discharging cargo taken on board in another state.

On the ground that its obligations were measured by the maritime law and the *New York Workman's Compensation Act* could not apply to it, the Southern Pacific Company contested the award and upon an adverse decision, brought the question before the Supreme Court.

The court in the *Jensen* case was confronted, therefore, with the problem which arose when an act of a state by its terms applied to persons whose right of recovery had theretofore been governed by maritime law. It became necessary to define the proper sphere of activity for the operation of state and federal law. The Supreme Court held the *New York Workman's Compensation Act* inapplicable and the obligations of the Southern Pacific Company governed by the rules of the maritime law.²⁸

The decision of the Court was severely criticized. It was urged that the policy which had brought about the enactment of the compensation statutes required that stevedores and harbor workers be permitted recovery under the acts.

Following the adverse comments upon the holding of the case and in response to the public demand that compensation acts be supported, Congress passed an amendment to the saving clause by which the clause was made to read that the federal courts had jurisdiction

“of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any State”.²⁹

After this statute was passed a bargeman in the employ of the Knickerbocker Ice Co. was drowned while performing work of a maritime nature. An award granted his representatives by the Industrial Commission of the State of New York was ap-

²⁸ *Supra* note 1.

²⁹ 40 STAT. 395 (1917), U. S. C. (1925) TIT. XXVII, § 41 (3). It was held that this statute was not retroactive. *Peters v. Veasey*, 251 U. S. 121 (1919).

proved by the Court of Appeals. The Supreme Court of the United States reversed the judgment on the ground that the statute amending the "saving clause" was unconstitutional.³⁰ The Court reasoned that the Constitution required a uniform treatment of the subject and that Congress could not so delegate its power as to bring about a lack of uniformity, as each state, under the power delegated, might pass different laws.

After this decision, Congress amended the Judicial Code to read that the district court should have jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States, which rights and remedies when conferred by such law shall be exclusive."³¹

This amendment was also held unconstitutional,³² the Court reasoning that to permit the application of various state laws would impinge upon the essential uniformity of the maritime law.

The result of these abortive efforts on the part of Congress finally led to more direct dealing with the problem by the passage of the *Longshoremen's and Harbor Workers' Compensation Act*,^{32a} but, as is seen from a reading of the act, it applies only to situations where state acts do not validly apply, thus leaving open as wide as may be the field in which state acts can operate.

Meanwhile, various decisions of the Supreme Court itself tended to clarify and perhaps modify the ruling in the *Jensen* case. We will see what these rulings were and attempt to define their effect.

³⁰ *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149 (1920).

³¹ 42 STAT. 634 (1922); U. S. C. (1925) TIT. XXVIII, § 41 (3).

³² *Washington v. Dawson*, 264 U. S. 219 (1924).

^{32a} 44 STAT. 1424 (1927), U. S. C. (Supp. No. 3, 1927) TIT. XXXIII, c. 18.

The cases which have arisen in the wake of the *Jensen* case divide into two general groups—the first group being those cases in which the employee sued in tort under the general maritime law.

Cases of the first type are *Grant Smith-Porter Co. v. Rohde*,³³ *Great Lakes Co. v. Kierejewski*,³⁴ *Gonsalves v. Morse Dry Dock Co.*,³⁵ *Messel v. Foundation Co.*,³⁶ and *Robins Dry Dock Co. v. Dahl*.³⁷

Of this group of cases, *Grant Smith-Porter Co. v. Rohde*, and *Gonsalves v. Morse Dry Dock Co.* were proceedings in tort in admiralty; *Great Lakes Co. v. Kierejewski* was an action in tort brought in a state court and removed to the federal court on the ground of diversity of citizenship; and *Messel v. Foundation Co.*, and *Robins Dry Dock Co. v. Dahl* were brought in tort in state courts.

Cases of the second group are those in which the employee sought an award of compensation, and the employer sought to invoke the maritime law to prevent such award.

Cases of this type are *Walker v. Clyde Steamship Co.*,³⁸ *Knickerbocker Ice Co. v. Stewart*,³⁹ *Peters v. Veasey*,⁴⁰ *State Industrial Commission v. Nordenholt Corp.*,⁴¹ *Washington v. Dawson*,⁴² *Miller's Indemnity Underwriters v. Braud*,⁴³ *State Industrial Commission of New York v. Terry & Tench*,⁴⁴ *Rosengrant v. Havard*.⁴⁵

We shall discuss cases of the first group; that is, those in which the employee sued in tort invoking the rules of the general

³³ 257 U. S. 469 (1922).

³⁴ 261 U. S. 479 (1923).

³⁵ 266 U. S. 171 (1924).

³⁶ 274 U. S. 417 (1927).

³⁷ 266 U. S. 449 (1925).

³⁸ 244 U. S. 255 (1917).

³⁹ *Supra* note 30.

⁴⁰ *Supra* note 29.

⁴¹ 259 U. S. 263 (1922).

⁴² *Supra* note 32.

⁴³ 270 U. S. 59 (1926).

⁴⁴ 273 U. S. 639 (1926).

⁴⁵ 273 U. S. 664 (1927).

maritime law, and recovered, setting aside for later discussion the *Rohde* case.

Let us approach these cases from the point of view of *tort actions*, as it will be seen that the form of action and the question presented by the pleadings to the Supreme Court in a large measure contributed to the confusion which the various opinions of that Court seemed to create.

A tort is a legal concept, and the rights and remedies flowing from its commission fully understood. A "maritime tort" is a tort of which an admiralty court will take jurisdiction, and define the obligations and the measure of recovery according to the rules of maritime law. In the United States, an admiralty court will take jurisdiction of torts committed and consummated on navigable waters.⁴⁶

No question is more clearly settled than that "locus" is the criterion establishing a maritime tort; the question is: "Did the injury result upon navigable waters?"

The English admiralty jurisdiction concerned itself with the question: "Was the damage, even though done on land, caused by a ship?" but the American courts asked the question "Was the injury result upon navigable waters?"

The different criteria of English and American jurisdiction in tort is significant. The English view was that admiralty dealt with ships, whereas in the United States the view was that admiralty dealt with occurrences on navigable waters.

Given the locality of the injury, therefore, in the United States in an admiralty court, the extent of the obligation by which the liability of a tort-feasor is to be measured, will be determined by the admiralty court, by applying the rules of the maritime law. When the complainant, proceeding under the saving clause, seeks to enforce his right in the state court, he is bound to measure his right by the corresponding obligation to him of the person against

⁴⁶ *Genesee Chief*, 53 U. S. 443 (1851); *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52 (1914); *Gonsalves v. Morse Dry Dock Co.*, *supra* note 35.

⁴⁷ See 1 *BENEDICT*, *op. cit. supra* note 10, §§ 231, 232. In order that the tort be within the jurisdiction of admiralty it is necessary both that it be committed and that it be effective on navigable waters. In other words, the cause of action must there be complete. *Martin v. West*, 222 U. S. 191 (1911).

whom his right is asserted, and this obligation, as it arises, is to be measured by the rules of the maritime law.

The saving clause saves to suitors "in all cases the right of a common-law remedy where the common law is competent to give it".⁴⁸

Although not theretofore delimited by the Supreme Court, the saving clause was thought merely to inhibit the states from creating a lien *in rem* against a vessel, but any other proceeding according to the course of the common law, might be had in the state courts.

But when the clause came for consideration in *Chelentis v. Luckenbach* the court said:⁴⁹

"In *The Moses Taylor*, 4 Wall. 411, 431, we said: 'That clause only saves to suitors "the right of a common law remedy, where the common law is competent to give it"'. It is not a remedy in the common law courts which is saved, but a common law remedy. A proceeding *in rem*, as used in the admiralty courts, is not a remedy afforded by the common law, it is a proceeding under the civil law'. And in *Knapp, Stout & Co. v. McCaffrey*, 177 U. S. 638, 644, 648: 'Some of the cases already cited recognize the distinction between a common law action and a common law remedy. Thus in *The Moses Taylor*, it is said of the saving clause of the Judiciary Act: "It is not a remedy in the common law courts which is saved, but a common law remedy". . . . The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. (Bouvier's Law Dictionary.) Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioners rights were those recognized by the law of the sea.' "

⁴⁸ *Supra* p. 933.

⁴⁹ 247 U. S. 372, 383, 384 (1918).

And again in the case of the *Red Cross Line v. Atlantic Fruit Co.*, the Court stated:⁵⁰

"The 'right of a common law remedy', so saved to suitors, does not, as has been held in cases which presently will be mentioned, include attempted changes by the States in the substantive admiralty law, *but it does include all means other than proceedings in admiralty which may be employed to enforce the right or redress the injury* . . . A state may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction. . . . But otherwise, the State, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit. . . . This state statute is wholly unlike those which have recently been held invalid by this court. The Arbitration Statute deals merely with *the remedy in the state courts* in respect of obligations *voluntarily and lawfully incurred*. It does not attempt to modify the substantive maritime law or to deal with the remedy in courts of admiralty."⁵¹

Until the delimitation of the "saving clause" in *Chelentis v. Luckenbach*,⁵² considerable confusion existed in the application of compensation acts in tort actions but that case made clear that the obligations of a tort-feasor to the plaintiff in an admiralty court or a state court were to be measured by the obligations imposed by the maritime law. Suing in tort the plaintiff sought to enforce a right in himself which grew out of a corresponding obligation on the part of the tort-feasor; but as the obligation sought to be enforced was one springing from the maritime law, the question still was, where was the injury suffered, because upon this depended the application of the rules of maritime law in the enforcement of plaintiff's rights or the defendant's obligations.

With these principles in mind, we proceed to examine the cases.

⁵⁰ 264 U. S. 109, 123, 124 (1924).

⁵¹ These definitions and delimitations were not received without expressions of surprise and disagreement. Cunningham, *Is Every County Court in the United States a Court of Admiralty?* (1919) 53 AM. L. REV. 749; *The Tables Turned—Lord Coke Demolished* (1921) 55 *ibid.* 685; Palfrey, *The Common Law Courts and The Law of the Sea* (1922) 36 HARV. L. REV. 777.

⁵² *Supra* note 49.

The official report of *Great Lakes Co. v. Kierejewski*,⁵³ states that "*The sole question* propounded by this direct writ of error is whether the District Court rightly held that it had jurisdiction to entertain the libel by which defendant in error sought to recover damages for the death of her husband." ⁵⁴

A correction in a subsequent report⁵⁵ indicates that this statement is incorrect. In fact the action was one "at law removed on diverse citizenship to the District Court, where an amendment to the complaint setting up an additional cause of action under § 33 of the Seamen's Act of June 5, 1920, C. 250, 41 Stat. 1007, was allowed. The question whether that court had *jurisdiction* of the case notwithstanding the state workmen's compensation law purporting to vest exclusive jurisdiction of such claims in a commission, came up on a direct writ of error (Jud. Code §238) to a judgment for damages based on a verdict".⁵⁶

The plain effect of this case is to sustain the *jurisdiction* of the federal court at law to entertain a cause of action under Section 33 of the *Jones Act*.⁵⁷ The court at the outset of its opinion indicates this, and says the sole question propounded by this direct writ of error is whether the district court rightly held that it had jurisdiction.

Aside from this, the negligence alleged in the case consisted in the wrongful manoeuvres of a tug belonging to the defendant; the injury was sustained on navigable waters, and therefore, in ascertaining liability it was necessary to look to the rules of the maritime law, including as they did, the inland rules of navigation.

The Court itself said the rules of the maritime law fixed the rights and liabilities of the parties.

In *Robins Dry Dock Co. v. Dahl* ⁵⁸ no question of a workmen's compensation act was before the Court, but the error relied

⁵³ *Supra* note 34.

⁵⁴ *Supra* note 34 at 480.

⁵⁵ See Errata, 266 U. S. ii (1925).

⁵⁶ *Ibid.*

⁵⁷ 41 STAT. 1007 (1920), U. S. C. (1925) TIT. XLVI, § 688.

⁵⁸ *Supra* note 37.

upon was the charge by the trial judge that a state labor law requiring a certain form of scaffolding was evidence of defendant's negligence. The Court merely applied, in the action under the saving clause, the doctrine laid down in the *Chelentis* case,⁵⁹ that the maritime law, and only that law, was the measure of the obligation of the parties in a state court, in an action in tort.

In *Messel v. Foundation Co.*,⁶⁰ the petitioner was injured while at work on the smoke-stack of a vessel, by the escape of steam from the mouth of a steam-pipe running from the engine to a point near where the petitioner was at work.

Proceedings were instituted under the *Civil Code of Louisiana*,⁶¹ under the section which includes the right of recovery for tort. The defendant excepted on the ground that the petition disclosed no legal cause of action. Petitioner then amended his petition and sought in the alternative an award of compensation. The state court decided that if the petitioner's right of action was not under the compensation statute, the state court was without jurisdiction by reason of the federal law, and that the state court had no jurisdiction in an action under the compensation statute if the injury occurred on board ship, and therefore, dismissed the suit. The Supreme Court on certiorari reversed the holding of the state court and held that the petitioner could bring an action in the state court under the saving clause.

In other words, the case is authority for the proposition that in an action in tort in a state court for injuries received on a ship in navigable waters, that court has jurisdiction of the cause under the saving clause. Of course, as we have seen in the *Chelentis* case,⁶² the maritime law must be applied.

Gonsalves v. Morse Dry Dock Co.,⁶³ was an action in tort in admiralty, for injuries received while repairing a ship in a floating dock in navigable waters.

⁵⁹ *Supra* note 49.

⁶⁰ *Supra* note 36.

⁶¹ (2d ed. 1913) Article 2315.

⁶² *Supra* note 49.

⁶³ *Supra* note 35.

The District Court sitting in admiralty, dismissed the libel on the ground that admiralty had no jurisdiction, it having been urged that a floating dry dock was not a ship or vessel but the Supreme Court reversed the District Court and held that admiralty had jurisdiction. Apparently no question of a workmen's compensation act was involved. In other words the case is in accord with the well-settled doctrine that admiralty jurisdiction in tort depends upon locality.

That a distinction may be made between an action brought in tort and one brought under a compensation statute is not without authority.

A case in which such a distinction is made is *Northern Coal & Dock Co. v. Industrial Commission of Wisconsin*,⁶⁴ where Judge Stevens (concurring opinion) distinguishes a case brought under a workmen's compensation statute from a case brought in tort. The Judge says:

"The controlling fact in this case is that this is not an action sounding in tort. It is a proceeding to recover a death benefit fixed by contract 'within a state whose positive enactment prescribed an exclusive remedy therefor. And as both parties had accepted and proceeded under the statute, . . . it cannot properly be said that they consciously contracted with each other in contemplation of the general system of maritime law'. *Grant Smith-Porter Co. v. Rohde*, 257 U. S. 459 (1922). 'An award under the Workmen's Compensation law is not made on the theory that a tort has been committed; on the contrary, it is upon the theory that the statute giving the Commission power to make an award is read into and becomes part of the contract'. *State Industrial Commission of New York v. Nordenholt Corporation*, 259 U. S. 263."⁶⁵

In another case in which it was sought to defeat an award of compensation by setting up the fact that the injury occurred on navigable waters and that therefore the compensation act did not apply, the court said:

⁶⁴ 193 Wis. 515, 215 N. W. 448 (1927), petition for certiorari granted, 48 Sup. Ct. 304 (1928).

⁶⁵ *Supra* note 64 at 519.

"The defense that the plaintiffs were not entitled to relief under the Workmen's Compensation law of Alaska, for the reason that the injury resulting in the death of the decedent, occurred on navigable waters, is without merit. Cases are cited for the proposition that admiralty jurisdiction in tort matters depends upon locality. But that proposition is not involved here. The case is not one of tort. Tort is neither alleged nor suggested".⁶⁶

In another recent case⁶⁷ the court says:

"In *Great Lake D. & D. Co. vs. Kierejewski, etc.*, 1923 A. M. C. 441, 261 U. S. 479, the suit was based upon injury received while performing maritime service upon navigable waters, and *El Occidente; Robins Dry Dock & Repair Co. vs. Dahl*, 1925 A. M. C. 182, 266 U. S. 449, and *Gonsolves vs. Morse D. D. & R. Co.*, 1924 A. M. C. 1539, 266 U. S. 171, were for torts while plaintiffs were engaged at work on vessels upon navigable streams.

"In the instant case the injured man was employed to work as a carpenter on a vessel out of commission and on dry dock and not upon any navigable water. True, petitioner was injured while being transported to his work on a launch which was at the time on the Mobile River, which is a navigable stream, but the action is not in tort; but upon contract which embraces the Workmen's Compensation Act, and, therefore, is controlled by the contract of employment rather than the place of injury."

The foregoing discussion disposes of the cases placed in group one, with the exception of *Grant Smith-Porter Co. v. Rohde*⁶⁸ which will be treated separately.

As we have seen, each case of the first group presented a jurisdictional question and each was decided upon the ground that a federal court or a state court, acting under the saving clause and applying maritime law, had jurisdiction of an action *brought in tort* for an injury suffered on navigable waters, and

⁶⁶ *Ketchikan Lumber & Shingle Co. v. Bishop*, 24 F. (2d) 63 (C. C. A. 9th, 1928).

⁶⁷ *Baker Tow Boat Co. v. Langner*, 1928 A. M. C. 538; opinion of Alabama Court of Appeals, February 7, 1928.

⁶⁸ *Supra* note 33.

in some of them it clearly appears and in others it inferentially appears that the subject matter was of a character requiring uniformity of ruling.

In cases where rights are invoked upon a *theory of contract* and *not upon a tort* or an obligation sanctioned by the maritime law of torts, a different question is presented.

The group of cases in which the action was not brought in tort, but brought to recover an award under a compensation act, will now be considered.

It is clear that if the injury occurs on land, the compensation law is applicable.⁶⁹

But when the injury occurs on navigable waters, that is to say within the jurisdiction of admiralty, the question as to whether the compensation law is applicable has persisted ever since the *Jensen* case and as we have seen from the discussion of the foregoing cases, the application of the compensation law sought to be made in those cases did not present the question clearly. The decisions, themselves, proceeded upon jurisdictional grounds, and upon those grounds and the need for uniformity of ruling on the facts of the various cases, the decisions were made.

As indicated, in the early portion of this article, the growth of admiralty jurisdiction carried with it two concepts—one, the need of uniformity, calling for regulation by federal authority and rulings by admiralty courts, and the other, the necessity for freedom of local action, because local regulation best met the necessities of the situation. In our discussion of the cases which follow, the development of this latter doctrine will be shown. It will be seen that all of the cases were actions brought under local workmen's compensation statutes and that the final result of the decisions points to the development and enforcement of the idea that states may, if they do not disturb the characteristic features of maritime law, regulate local matters, although in such regulation the field of maritime law suffers encroachment.

⁶⁹ State Industrial Commission v. Nordenholt Corp., *supra* note 41; Smith v. Taylor, 48 Sup. Ct. 228 (1928).

Having as its underlying principle the award of compensation in all cases of injury from industrial accidents, the workmen's compensation statutes permit compensation awards in cases for which the employee previously had no right of recovery. This new right is founded not on a concept of new reciprocal obligations arising out of the relationship of employer and employee and sanctioned by the law of torts, but is founded in contract. This contract is now said to contain the terms of the statute, either because the law implies such terms or because the statute itself provides that its terms shall apply. When suit is instituted under the workmen's compensation statutes, it is brought to enforce this implied or statutory term of the contract of employment.⁷⁰

It is also to be observed that the underlying scheme of all compensation statutes is to provide a method of insurance to employer and employee alike, so that the burden of industrial accidents may become more evenly distributed in industrial society.

In cases brought to enforce compensation awards, the question before the court is not, as in the tort cases, whether the state legislature may change the obligation of the parties from that existing under the maritime law, but whether the parties may by contract, voluntarily and lawfully made, impose upon themselves obligations differing from those which would otherwise exist under the maritime law.

If the parties voluntarily agree that the rule to be applied as between themselves shall be other than that which would obtain under the maritime law, there would seem to be no objection to the enforcement of their agreement *inter partes* for such enforcement produces no change in the body of the maritime law, nor does it affect its essential characteristic of uniformity. It is only where a state statute applies to the parties irrespective of agreement that the question of the effect of the application of the statute on the rule of uniformity must be considered.

There are in general two types of compensation statutes.

⁷⁰ See cases cited under Workmen's Compensation Acts, 40 Cyc., Appendix 7, n. 29; *Liberato v. Royer*, 270 U. S. 535 (1926).

By the compulsory type, employer and employee are compelled to accept the provisions of the statute. By the elective type, employer or employee may, by notice of non-acceptance, avoid liability or right to compensation. However, an employer refusing to accept the statute loses his common law defenses of contributory negligence and assumption of the risk, including the risk of the negligence of a fellow-servant.

The cases of the second group, *supra* p. 935, that is to say, those in which an award of compensation has been sought for injuries sustained on navigable waters, will now be considered, having regard to the contract theory of recovery of compensation, the various types of statute whether elective or compulsory, and the need for a uniform system of maritime law in certain situations.

*Southern Pacific Co. v. Jensen*⁷¹ is the leading case denying recovery under a compensation statute, to a workman injured on navigable waters.

Both this case and the case of *Clyde Steamship Co. v. Walker*,⁷² present the salient fact that the claims were made under the *New York Compensation Statute*, which is compulsory, and in both cases the award of the State Industrial Commission was made *against a carrier engaged in interstate commerce*, owner of the ship on which the claimant, or the decedent of the representative claimant, sustained injuries in the course of employment as stevedores, unloading the ship. The Supreme Court of the United States held that awards made to the injured workman or to the representatives of the deceased should be annulled on the ground that the *New York Workmen's Compensation Statute* was inapplicable.

The *Clyde* case⁷³ was decided simultaneously with the *Jensen* case. The finding of the New York Industrial Commission in the *Clyde* case was that:

" . . . the business of the Clyde Steamship Company in this state consists solely of carrying passengers and merchandise to New York from other states and carrying passengers

⁷¹ *Supra* note 1.

⁷² *Supra* note 38.

⁷³ *Supra* note 38.

and merchandise from New York to other states. All cargo on board the Cherokee, including the lumber aforesaid, had been taken on board in the State of North Carolina, and carried by water to New York, and was there unloaded from the SS. Cherokee. The claimant was engaged solely in handling said lumber." ⁷⁴

The interest of the ship and the interest of interstate commerce were thus very much involved in the issue of these cases and the effect of the decisions and the need for uniformity clearly apparent.

Neither of the cases ⁷⁵ holding the statutes of Congress unconstitutional, are authority to the effect that a local employer and his employee could not, *inter se*, be subject to the provisions of a state statute.

Both statutes had an effect much wider than this—the first attempted to save to all suitors, regardless of the rule of uniformity, that is regardless of whether the suitor was employed by ship or shipowner, the remedy of a state compensation statute when suit was brought in a state court; the second, to save such remedy to all suitors except masters of vessels and members of the crew.

The idea behind the rule is indicated in the language of the Court in *Washington v. Dawson* ⁷⁶ by its reference to the confusion and difficulty which might result "if vessels were compelled to comply with local statutes at every port" or if the definite design of freeing maritime commerce at the root of the formation of the Union was to be destroyed by "intolerable restrictions" incident to State control.

This thought is well expressed in a recent opinion: ⁷⁷

"Very clearly any act which attempts to subject either ships or shipowners to the provisions of state compensation acts would interfere with uniformity and harmony in the

⁷⁴ *Supra* note 38 at 257.

⁷⁵ *Knickerbocker Ice Co. v. Stewart*, *supra* note 30; *Washington v. Dawson*, *supra* note 32.

⁷⁶ *Supra* note 32 at 228.

⁷⁷ *Northern Coal & Dock Company v. Industrial Commission of Wisconsin*, *supra* note 64.

administration of admiralty and maritime laws, *because the ship might be subject to a different law in every port in which it landed.*"

But when a state statute does not apply to a shipowner or to a subject over which uniformity of rule is necessary, it has been decided that a workmen's compensation statute may apply, at least when the statute is elective. The leading case to this effect is *Grant Smith-Porter Co. v. Rohde*.⁷⁸ The libellant sought recovery in admiralty in tort for injuries sustained while employed as a carpenter on board a launched, but incompleated, vessel. The injury occurred in Oregon waters in which state an elective compensation statute was in force. The Circuit Court of Appeals certified to the Supreme Court two questions—first, whether admiralty had jurisdiction of a proceeding brought in tort under the facts involved; second, whether under the circumstances the Oregon statute abrogated the otherwise existing right to recover damages in an admiralty court. Both questions the Supreme Court answered in the affirmative. It is, therefore, decided that although admiralty may have jurisdiction of a cause, the right of recovery may be abrogated in the same circumstances by a state statute.

The court said: "Neither Rohde's general employment, nor his activities at the time had any direct relation to navigation or commerce"; and further that "under such circumstances regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, *by a local rule* would not necessarily work material prejudice to any characteristic features of the general maritime law, or interfere with the proper harmony or uniformity of that law in its *international or interstate relations*".⁷⁹

Miller's Indemnity Underwriters v. Braud^{79a} further develops what was meant by the words "local rule" as used in the *Rohde* case and the words "local concern" as used by the court in *Washington v. Dawson*.⁸⁰

⁷⁸ *Supra* note 33.

⁷⁹ *Supra* note 33 at 476.

^{79a} *Supra* note 43.

⁸⁰ *Supra* note 32 at 227.

In *Miller's Indemnity Underwriters v. Braud*, a diver became suffocated while removing abandoned ways which, lying at the bottom of a navigable river, had become a menace to navigation. It was held that the representatives of the deceased could recover an award of compensation. The Court relied chiefly on the *Rohde* case in reaching its decision.

In the opinion, in reference to that case, the Court said:⁸¹

"Stressing the point that the parties were clearly and consciously within the terms of the statute and did not in fact suppose they were contracting with reference to the general system of maritime law, we alluded to the circumstances, not otherwise of special importance, that each of them had contributed to the industrial accident fund."

The Court also said⁸² "but the matter is of mere local concern and its regulation by the State will work no material prejudice to any characteristic feature of the general maritime law". The court further said:⁸³

"We had occasion to consider matters which were not of mere local concern because of their *special relation to commerce and navigation* and held them beyond the regulatory power of the state, in *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U. S. 479; *Washington v. Dawson & Co.*, 264 U. S. 219; *Gonsalves v. Morse Dry Dock Co.*, 266 U. S. 171; and *Robins Dry Dock Co. v. Dahl*, 266 U. S. 449, 457".

It is significant that all of the cited cases (except *Washington v. Dawson*) were cases brought *in tort* and in which the ship might well have become involved.⁸⁴

⁸¹ *Supra* note 43 at 64.

⁸² *Ibid.*

⁸³ *Supra* note 43 at 65.

⁸⁴ Certain state courts have allowed recovery under facts similar to the *Jensen* case, and based their decision on the ground that the statute in question was of the elective type. *West v. Kozier*, 104 Ore. 94, 206 Pac. 542 (1922); *Bockhop v. Phoenix Transit Co.*, 97 N. J. L. 514, 117 Atl. 624 (1922); *Lumbermen's Reciprocal Assn. v. Adcock*, 244 S. W. 645 (Tex. Civ. App. 1922); *Southern Surety Co. v. Stubbs*, 199 S. W. 343 (Tex. Civ. App. 1917); *Toland's Case*, 258 Mass. 470, 155 N. E. 602 (1927); *Span v. Baizley Iron Works*, *infra* note 85.

There are several decisions of state courts containing dicta to the effect that differences between a compulsory and an elective statute cannot be made the

Another point for consideration arises out of the provisions of the various compensation acts as to insurance. Many compensation statutes provide not only for insurance but the terms of the policy of insurance, or permit a board to make rules governing insurance, so that the result attained is that either under the policy provided by the statutes or the rules promulgated by the board, an insurance fund or carrier becomes directly liable to the employee. By some statutes the employee may obtain a

basis of the application or non-application of the state compensation act. *Dorman's Case*, 236 Mass. 583, 129 N. E. 352 (1921); *Foppen v. Fase & Co.*, 219 Mich. 136, 188 N. W. 541 (1922); *Thornton v. Grand Trunk Ferry Co.*, 202 Mich. 609, 168 N. W. 541 (1918); *Soderstrom v. Curry & White, Inc.*, 143 Minn. 154, 173 N. W. 649 (1919); *Christensen v. Morse Dry Dock & Repair Co.*, 214 N. Y. Supp. 732 (1926); *Neff v. Industrial Commission*, 166 Wis. 126, 164 N. W. 845 (1917). In the opinion of *Matter of Lahti v. Terry & Tench*, 240 N. Y. 292, 148 N. E. 527 (1925), *rev'd sub nom* *State Industrial Commission v. Terry & Tench*, *supra* note 44, the New York Court of Appeals stated that their decision, holding the statute inapplicable would have been otherwise under an elective act. Two objections against distinguishing an elective and a compulsory act have been advanced:

1. A court otherwise without jurisdiction of the cause cannot obtain jurisdiction thereof by contract of the parties. *Zurich General Accident & L. Ins. Co. v. Industrial Accident Com.*, 191 Cal. 770, 218 Pac. 563 (1923); *Duart v. Simmons*, 231 Mass. 313, 121 N. E. 10 (1918); *Christensen v. Morse Dry Dock & Repair Co.*, *supra*.

2. Elective and compulsory statutes are not sufficiently unlike so that an elective statute may be applicable to an injury sustained on navigable waters, while a compulsory statute may not be because of the rule of the *Jensen* case.

The first of the above reasons bears analysis.

The contract of employment involved in a workmen's compensation award is not that a designated tribunal shall render judgment or make an award, the authority to do this being under the statutes.

A suit in such cases is really to enforce the terms of a contract wherein the statute by its terms or by implication is part of the contract of employment, and courts, other jurisdictional facts being present, always have jurisdiction in contract matters.

Compensation acts offer a plan which, while different from the law previously existing, leaves the workman free to contract with regard to it. The contract provides for the new arrangement and its statutory consequences and the court takes jurisdiction of this contract. (*Liberato v. Royer*, *supra* note 70.)

Nor would it seem that the differences between the elective and compulsory types of statute are immaterial.

By the provisions of most elective statutes, employer or employee can refuse to accept the statute if he so desires. The presumption that the statute is accepted unless express notice of non-acceptance is given is a statutory presumption read into the contract just as many other terms may be implied in a contract.

It may be argued that to be compelled to ascertain whether there is a compensation statute in order to determine whether to elect to be thereby bound is as much subjecting employee and employer to the local law as though there were a compulsory statute.

There is much force in this argument when the employer is a shipowner. To hold him to a knowledge of the local law might well infringe upon that uniformity found to be essential in the maritime law.

judgment directly against the carrier upon an award without bringing any action against his employer.

It results in those cases that in reality the defendant in interest is usually the insurance carrier.⁸⁵ Even though the employer is not subject to the compensation act, it may still be that a state statute may apply to and affect the rights and liabilities of the insurance company and the employee *inter se*.

Having once entered into the agreement of insurance provided by statute and having taken premiums for such insurance, it would seem that the insurance company should not be allowed to assert that the rights and liabilities of the employer and employee *inter se*, are subject to the maritime law.

If the statute makes an insurance company directly liable to the insured, that liability does not depend upon the liability of a ship or shipowner, nor does it depend upon the commission of a tort, and a judgment against an insurance company enforcing that liability cannot be said to disturb the uniformity of maritime law or affect that uniformity so necessary to ships and shipowners. The contract between the insured employee and the insurance company is therefore a contract to which the appli-

The situation of an employer who is located within a state and is there engaged in the employ of men is entirely different in that he can well be held to know the provisions of the state compensation act. Knowing the provisions of that act he is in a position to decide whether or not he wishes to enter into contracts of employment with his employees subject to the terms impliedly read into the contract by the statute. Thus can the interests of commerce and the interests in the welfare of injured employees be cared for. See *Sultan Ry. & Timber Co. v. Department of Labor of State of Washington*, U. S. Sup. Ct., decided May 14, 1928, in which it is stated that a state compensation statute may apply to maritime employment if the application thereof will not interfere with the characteristic features and uniformity of the maritime law.

It is at this point that the fact becomes important that in the *Jensen* case, *Jensen's* employer was the shipowner. When these two facts coincide, it may be that a state compensation statute will be held inapplicable.

It is indicated in the opinion of *Miller's Indemnity Underwriters v. Braud*, *supra* note 43, that whether or not a compensation act applies to an injury or death occurring on navigable waters may depend upon whether the statute is elective or compulsory, for the Court said, as quoted above, in speaking of the *Rohde* case: "Stressing the point that the parties were clearly and consciously within the terms of the statute and did not in fact suppose they were contracting with reference to the general system of the maritime law, we alluded to the circumstances, not otherwise of special importance, that each of them had contributed to the industrial accident fund."

⁸⁵ *Span v. Baizley Iron Works*, 8 Adv. (Pa. Super.) 378 (1928); application for hearing on appeal granted by Pennsylvania Supreme Court, May 15, 1928.

cation of the uniform maritime law would seem unnecessary, or conversely, it is a matter of local concern such as may be governed by a state compensation statute.

In the various attempts by the state and lower federal courts to reconcile the antagonism seemingly existent in the application of state compensation laws and the admiralty law, the suggestion has been advanced in some of the cases that if the locus be maritime and the claimant be engaged upon work of a maritime character, a state statute cannot be applicable, but if either of these elements is lacking a state statute may be applicable and abrogate the otherwise existing right of recovery in admiralty.⁸⁶

An examination of the suggestion, in the light of the answer to the certified questions in the *Rohde* case, will lead to the view that it is not the absence of either one of these elements that abrogates the right to recover.

It is an examination of the state statute applicable, which leads to the correct solution of the question. This solution is that, although the locus may be maritime, and therefore, subject to *general* admiralty jurisdiction, yet if the subject is of local concern, the compensation act, as indicated by the answer to the second question in the *Rohde* case, applies although the effect is to "*abrogate the right to recover damages in an admiralty court which otherwise would exist.*"

Of *Miller's Indemnity Underwriters v. Braud*⁸⁷ it is said in a recent decision in the Eastern District of Virginia:⁸⁸

"the principle announced in the Jensen case was modified at least to the extent of holding that even in cases in which both contract and tort are maritime, where the matter is of mere local concern and will work no material prejudice to any characteristic feature of the general maritime law, relief under a state compensation statute may be secured."

⁸⁶ In *London Guarantee & Accident Co. v. Industrial Accident Commission*, 253 Pac. 323 (Cal. App., 1927), it is stated that the absence of either will permit the application of the state statute. In *Fitzgerald v. Harbor Lighterage Co.*, 244 N. Y. 132, 155 N. E. 74 (1926), it is stated, as is well settled, that if the locus is non-maritime the state law may apply, and no mention is made of what the result would be if the work being performed were non-maritime.

⁸⁷ *Supra* note 43.

⁸⁸ *Colonna's Shipyard, Inc. v. SS. Lowe*, 22 F. (2d) 843 (E. D. Va. 1927).

In certain opinions of lower federal courts, it is stated that in the *Rohde* case the right of recovery in tort was held to be abrogated because the contract of employment was non-maritime.⁸⁹ The opinion in the *Braud* case indicates that no such distinction exists.

It has been said by the Supreme Court that in the *Rohde* case the compensation act was held applicable because the work in question was of mere "local concern".⁹⁰ In the latter two of the cited cases it is stated that the contract of employment is non-maritime, but the further statement is added (quoted from the *Rohde* case) that "neither *Rohde's* general employment, nor his activities at the time had any direct relation to navigation or commerce". It thus remains to be determined whether the matter was of mere local concern because the contract of employment was non-maritime, or for some other reason, such as that a ship or shipowner, or some rule of navigation was involved.

That a compensation statute may be applicable even though both contract and locus are maritime is further borne out by an examination of the case of *Rosengrant v. Havard*.⁹¹

The facts in this case appear in the opinions of the Supreme Court of Alabama.⁹²

Decedent's work was to tally and grade lumber being unloaded from a barge into the defendant's planing mill. Lashed to the barge was a schooner. A tugboat was standing by, to tow away the barge when unloaded. Decedent was sitting on the schooner tallying the lumber. While there he was accidentally killed by a bullet from a pistol in the hands of a member of the crew of the tugboat. The Alabama court held that the representatives of the deceased could recover a compensation award. The court said: ⁹³

"Mr. Havard was not doing any of the physical labor of moving the lumber and the service he was performing

⁸⁹ The *Mercedes de Larrinaga*, 293 Fed. 251 (D. C. Mass. 1923); *Jordon v. Leyland & Co.*, 7 F.(2d) 386 (E. D. La. 1925).

⁹⁰ *Robins Dry Dock Co. v. Dahl*, *supra* note 37 at 457; *Washington v. Dawson*, *supra* note 32 at 227; *Great Lakes Co. v. Kierejewski*, *supra* note 34 at 480.

⁹¹ *Supra* note 45.

⁹² 211 Ala. 605, 100 So. 897 (1924); and 213 Ala. 202, 104 So. 409 (1925).

⁹³ 213 Ala. at 203.

when shot could have been performed as well on the dock or wharf as on the barge or schooner."

The work of the deceased was as essential to the unloading as was the manual labor of carrying the lumber from the vessel. To reason, as did the Alabama court, that because his work could just as well have been done on land and that therefore the admiralty law could not apply, does not impress one as sound. The question is not where the deceased could have worked but where he was working. That he could have done the work on land does not make the contract any less a maritime contract.

In its second opinion,⁹⁴ the Alabama court seems to indicate that the chief duties of the deceased were of a secretarial nature and that his duties as checker were only incidental.

The judgment of the Alabama court was affirmed by the United States Supreme Court in a memorandum opinion. We are left in the dark, of course, but it may be that the Supreme Court, in affirming the conclusion of the lower court that the compensation statute applied, did so on the assumption that the shooting was accidental and no tort was involved, at least as far as the defendant was concerned and that, therefore, it not being an action of tort, and the claimant, although injured on navigable waters and engaged on work having to do with the unloading of the ship was within the purview of a compensation act operating in the set of circumstances of local concern.⁹⁵

That a recovery may be had under a compensation statute, though both contract and locus be maritime, is further borne out, if one may draw any inference, from the refusal of the Supreme Court to grant a certiorari, in the case of *Southern Surety Company v. Crawford*.⁹⁶

There a member of the crew of a non-seagoing dredge was drowned when the dredge foundered and sank. His representa-

⁹⁴ *Supra* note 92.

⁹⁵ See comment (1927) 75 U. OF PA. L. REV. 469, suggesting that a state statute may apply where both locus and contract of employment are maritime, if the matter is not of such a nature as to seriously affect the harmony and uniformity desirable in the maritime law.

⁹⁶ 274 S. W. 280 (Tex. Civ. App. 1925); certiorari denied, 270 U. S. 655 (1926).

tives brought suit in a state court against the compensation insurance carrier, basing the suit on a contract between the carrier and the employer for the benefit of the employee, setting up that the contract was maritime in character *and further that the parties had voluntarily contracted with reference to the local elective compensation act.*

Here certainly the locus was maritime within the meaning of the *Gonsalves* case,⁹⁷ but the injuries apparently were not the result of tort, nor was the action brought in tort. The fact that the vessel was non-seagoing, in the light of a long line of decisions, appears to be without weight and it would seem that this case is in line with the *Havard* case,⁹⁸ above-referred to.

In a case recently decided by the Supreme Court⁹⁹ the compensation claimant was employed as a member of the crew of a fishing vessel, and was injured while endeavoring to push a stranded fishing boat into navigable waters. The Supreme Court assumed the cause to be within the jurisdiction of admiralty, but held that the claimant could recover an award under a state compensation act, the Court reasoning that the case fell within the rule of *Grant Smith-Porter Co. v. Rohde*¹⁰⁰ and *Miller's Indemnity Underwriters v. Braud*.¹⁰¹

Seamen have been considered as wards of an admiralty court but nevertheless a compensation statute was held applicable to a seaman. Here again the state statute was applied to a situation in which both locus and contract were maritime.

The *Jensen* case was decided in May, 1917; the *Alaska Packers'* case was decided in April, 1928. More than ten years elapsed between the decision in the *Jensen* case and the *Packers'* case but in that ten years some 22 cases and upwards, presenting in one phase or another, questions of the application of workmen's compensation acts to injuries on navigable waters were presented to

⁹⁷ *Supra* note 35.

⁹⁸ *Supra* note 45.

⁹⁹ *Alaska Packers' Assn. v. State Industrial Commission of California*, 48 Sup. Ct. 346 (1928).

¹⁰⁰ *Supra* note 33.

¹⁰¹ *Supra* note 43.

the Supreme Court. Four acts of Congress were passed dealing with the subject and in addition numerous decisions in the state courts have been made and articles without number in the various law journals and reviews have been written.

The *Jensen* case was an action brought to enforce an award to a stevedore injured on board ship and on navigable waters; the *Alaska Packers'* case was an action brought to enforce an award to a member of a crew injured, if not upon navigable waters, at least with one foot on the strand and the other in a boat which he was engaged in releasing from the strand; and the Supreme Court in its opinion assumed that the matter was of admiralty cognizance.

It is difficult to see the difference in facts between the *Jensen* case and the *Packers'* case, but in addition to the difference in time, there is the above noted growth in thought. This growth has been referred to in at least one case as an "inevitable trek backward" by the Supreme Court,¹⁰² but as we have attempted to show, the difference is not in the time but in the development by the Supreme Court of the doctrine of *Cooley v. The Board of Wardens*,¹⁰³ which doctrine was adverted to in the decision in the *Jensen* case, in the following language: "In view of the constitutional provisions and the federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied."¹⁰⁴ The scope and living force of that doctrine in the law of the United States is made more manifest in *Grant Smith-Porter Co. v. Rohde*;¹⁰⁵ *Miller's Indemnity Underwriters v. Braud*;¹⁰⁶ and *Alaska Packers' Assn. v. State Industrial Commission of California*.¹⁰⁷

¹⁰² *Lindberg v. Southern Casualty Co.*, 15 F.(2d) 54, 55 (S. D. Tex. 1926), *aff'd* 18 F.(2d) 453 (C. C. A. 5th, 1927); certiorari denied, 274 U. S. 759 (1927).

¹⁰³ *Supra* note 18.

¹⁰⁴ *Supra* note 1 at 216.

¹⁰⁵ *Supra* note 33.

¹⁰⁶ *Supra* note 43.

¹⁰⁷ *Supra* note 99.

SUMMARY

The inquiry which has been made into the foregoing cases, indicates the present rule of the Supreme Court to be, that in matters of interstate and foreign commerce, the underlying principle requiring the maintenance of admiralty jurisdiction is the need of uniformity; that this requirement is paramount in matters of national concern and must be applied to the exclusion of state statutes, if the application of such statutes will work prejudice to the characteristic features of maritime law.

The rule, however, recognizes that there are matters of local concern which may be provided for by the various states to meet the changing needs of the times and varying local requirements. Workmen's compensation acts of a certain type have come to be regarded as within this category.

Congress has given ample indication of its recognition of the workmen's compensation acts and the desirability for their application in the various states. It has done this not only in its attempts to amend the Judicial Code, but by withholding the operation of its own act in those situations where a state act may be validly applied.

In reading the cases following the *Jensen* case, it will be noted that they may be divided into two groups—those in which the action is founded on a tort, and those in which the basis of the suit is the workmen's compensation statute itself.

At least, if the compensation statute is not compulsory, the suit is based upon the theory of contract and consideration is given, not only to the terms of the actual contract between the employer and employees, but to such implications as are necessarily involved by reason of the statutory provisions.

If the suit be to enforce an award a different question is presented than in a suit to recover for a tort. If the suit be to enforce an award the question presented is whether the enforcement of the award in the circumstances will disturb the uniformity of the maritime law, or whether the parties to the suit are so circumstanced with relation to themselves and to ships and interstate commerce that the enforcement of the award as to them is a matter of local concern. In such suits the terms of the statute and the status of the parties are to be inquired into.

If the suit be in tort, it is based upon the breach of an obligation sanctioned by the law of torts, whether that law be of the state or the maritime code.

In such a suit, if the tort is sought to be enforced in a state court, under its law, the question arises: Does a state compensation statute prohibit tort actions? If the suit is either in a state or federal court for a maritime tort, the question now is one of jurisdiction and the question of jurisdiction resolves itself into two further questions—first, is the locality of the injury upon navigable waters, and second, is the right to sue in tort for an injury sustained in that locality abrogated by a state statute which can only be effective in matters of local concern thereby saving intact the characteristic features of the maritime law.

When it comes to questions of the liability to or by ship or shipowner for maritime contracts other than those of employment, such as charter parties, bills of lading, marine insurance, etc., it is manifest that the need for uniformity and the preservation of the characteristic features of the maritime law demand that such contracts be governed by the uniform maritime law, and no difficulty will be found in applying it.

With the *Longshoremen's and Harbor Workers' Compensation Act* now in force and the decisions above noted more clearly understood, the line of demarcation becomes more definite, although questions of what is or is not a local concern will remain, and questions of when the *Longshoremen's Act* does or does not apply, will arise under the provisions of the Act, which states that it shall not apply to situations where the state act may be "validly applied."

In the endeavor made to follow the wavering light of the *Jensen* case, it is hoped that various dangerous shoals have now been passed for court and litigant, and the depths and shallows, along the line of the *corpus comitatus* marked out.

The powers of the national government tend to expand, but in the process of that expansion, let us not forget to test the reason for such expansion, and in the light of that reason permit the states to enjoy such powers as can best be exercised by the state rather than by the federal government.